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No. 95-2146

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United States of America,

Appellee,

v.

Sherman Burks,

Appellant.

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Appeal from the United States  
District Court for the  
Eastern District of Missouri.  
[UNPUBLISHED]

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Submitted: December 29, 1995

Filed: January 19, 1996

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Before WOLLMAN, MAGILL, and HANSEN, Circuit Judges.

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PER CURIAM.

Sherman Burks, an African-American, appeals the 97-month sentence imposed by the district court<sup>1</sup> after he pleaded guilty to distributing cocaine base (crack), in violation of 21 U.S.C. § 841(a)(1). We affirm.

Following the preparation of his presentence report, Burks objected to his offense-level calculation. Burks contended that no scientific difference existed between crack cocaine and powder cocaine, and that the penalty provisions set forth in 21 U.S.C. § 841(b) were thus void for vagueness or rendered inapplicable by operation of the rule of lenity. He also argued that Congress enacted section 841(b) in an arbitrary and irrational manner,

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<sup>1</sup>The Honorable Jean C. Hamilton, Chief Judge, United States District Court for the Eastern District of Missouri.

resulting in a disparate impact upon African-Americans in violation of his due process and equal protection rights.

Burks relied on United States v. Davis, 864 F. Supp. 1303 (N.D. Ga. 1994), appeal pending (No. 95-8057 11th Cir.), in which the district court, after an evidentiary hearing, held that the terms "cocaine" and "cocaine base" were synonymous; that the penalty provisions of section 841(b) set forth a scientifically meaningless distinction between cocaine and cocaine base; and that the heightened penalties for cocaine base must be ignored by operation of the rule of lenity. 864 F. Supp. at 1309. In support, Burks submitted copies of the Davis court records--including Davis's memorandum of law, the hearing transcript, and the district court's decision.

In addition, Burks sought a downward departure under 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0, based on the United States Sentencing Commission's February 1995 report concluding that the 100-to-1 ratio between the penalties for crack cocaine and powder cocaine was not justified, and a proposed Guidelines amendment--which would have eliminated the 100-to-1 ratio--forwarded by the Commission to Congress for its consideration. Burks renews his claims on appeal.

We conclude Burks's void-for-vagueness and rule-of-lenity arguments are foreclosed by our decision in United States v. Jackson, 64 F.3d 1213, 1219-20 (8th Cir. 1995); his due process and equal protection arguments are foreclosed by our decision in United States v. Jackson, 67 F.3d 1359, 1367 (8th Cir. 1995); and his downward-departure argument is foreclosed by our decision in United States v. Higgs, No. 95-1928, slip op. at 2, 1995 WL 716193 (8th Cir. Nov. 9, 1995) (per curiam).

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.